



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 91 OF 2006

CO-OPERATIVE BANK OF KENYA LTD APPELLANT

VERSUS

MATHEWS OKANYA ODHIAMBO DEFENDANT

J U D G M E N T

The appeal herein arises from the judgment and decree of the Chief Magistrate's Court at Milimani Commercial Court, Nairobi, delivered on the 26th day of January 2006 by the Honourable Mr Kaikai, Resident Magistrate.

Brief facts of the case are that the appellant Co-operative Bank of Kenya Ltd, a financial institution were bankers for the respondent Mathew Okanya Odhiambo. The appellant issued the respondent with a credit card known as Co-op card upon the application by the respondent on 9th September, 1995. The card was No. 440782000000.

The issuance and subsequent use of the said credit card was governed by certain terms and conditions. The respondent signed a declaration to that effect. It was alleged that in breach of the express terms and conditions of the issuance of the said credit card, the respondent failed to make payments of the amounts due in respect of the use of the card on the due dates and as at 18th June 2003, he was indebted to the appellant in the sum of Ksh. 178,040.83. The appellant sued the respondent for breach of contract, claiming Ksh. 178,040.83.

The respondent's defence filed on 3rd May 2004 admitted they issued HIM with a credit card as pleaded by the appellant but stated that he paid all the sums due and owing to the appellant after inquiring on the balance in February 1998 after which he surrendered the said card to the appellant.

In his judgment delivered on 26th January 2006, the Learned Magistrate dismissed the appellant's case against the respondent on the ground that records were not clear and that the computations were erroneous.

Being aggrieved by the judgment and decree dismissing its suit against the respondent, the appellant filed the appeal herein, setting out six grounds of appeal namely;

The appeal was opposed by the respondents.

The advocates appeared before me on 17th September 2014 and made oral submissions.

Mr Mungai for the appellant submitted in support of the six grounds of appeal that from the onset, the judgment by Hon. Mr Kaikai R M was very casual, containing only 2 ½ pages on evidence that he considered very weighty. He further submitted that the Learned Magistrate did not appreciate the weighty documentary evidence adduced that proved the appellant's claim against the respondent on a balance of probability.

In addition, counsel submitted that the Learned Magistrate's finding that the respondent only owed the appellant Ksh. 28,872/- was faulty as the finding does not tally with the statement of account for March 1998 produced in evidence by the appellant. Mr Mungai further submitted that the Learned Magistrate totally ignored evidence on record that clearly showed how the appellant arrived at the claim due and instead resorted to simple arithmetic without any basis.

Referring to page 21 of the proceedings, counsel averred that the respondents had admitted the several entries in the statement of account showing that he had fueled at Mumias Total Petrol Station. He complained that the trial magistrate totally ignored the respondent's own evidence which corroborated the statement of account referring at page 20 of the record of appeal, the last 4 lines. He submitted that the appellant's evidence was uncontroverted by the respondent yet the Learned Magistrate overlooked the very material evidence in the determination of the suit.

He challenged the defence by the respondent submitting that the respondent never proved his averment that he indeed surrendered the credit card back to the appellant as alleged, hence, it must be inferred that he still had the credit card.

Finally, counsel complained that the Learned Magistrate failed to appreciate evidence that a black listed credit card could still be used to procure goods and services. He faulted the trial magistrate's finding at page 29 of the record that **"it is not clear the card was surrendered."** He urged the court to look at the two records of appeal and consider the submissions and find in favour of the appellant as the claim which was liquidated was proved on a balance of probability.

He prayed for costs of the suit in the Subordinate Court and costs of this appeal and interest.

Mr Wanyanga, counsel for the respondent opposed the appeal and submitted supporting the judgment of the Learned Resident Magistrate dismissing the appellant's claim with costs as the appellant did not prove its case against the respondent on a balance of probability.

According to counsel, albeit the appellant claimed for Ksh. 178,040.83, his witness – PW1 a legal officer testified that the respondent had paid Ksh. 71,000/- and that there was a balance which did not add up, and therefore the Learned Magistrate was right in finding that the figures did not add up.

Counsel referred the Court to page 16 of the record of appeal which showed that Ksh. 71,000/- was paid and that Ksh. 97,872/- was owing as at February 1998. He further submitted that if the conditions of issuance of the credit card were clear that the credit limit was Ksh. 50,000/-, there was no reason why the appellant allowed the respondent to exceed the said sums in the usage of the card to procure for goods and services. He submitted further that it was the appellant's fault to permit the respondent to utilize the credit card even after it expired and that they could not be expected to claim amounts expended on a contract that had expired.

According to counsel, as there was evidence that the card had been blacklisted, there is no explanation why the appellant did allow the transactions on a blacklisted card. He blamed the appellant bank for failing to warn customers immediately after the credit card limit had been exceeded.

According to counsel, it was possible that somebody else was using the credit card after its expiry as the respondent had surrendered it back to the appellant. In addition, he submitted that as it was the responsibility of the appellant to stop the usage of a blacklisted/expired credit card, failure to do so

estopped them from claiming compensation from the respondent for the loss incurred as a result of its usage as they were responsible for the loss.

He supported the Learned Magistrate's findings that the record was not clear and that the computation was erroneous as it was clear the figures did not tally to warrant a judgment in its favour. He urged the Court to dismiss the appeal with costs as the oral evidence adduced did not support the documents produced.

In reply by the appellant's counsel to the respondent's counsel's submissions; the appellant submitted that what the appellant was expected to prove in a civil case like this one was on a balance of probability not beyond reasonable doubt. He further emphasized that the appellant's evidence on record was uncontroverted as none of the statements of accounts produced were challenged on account of being erroneous. He further submitted that even if the appellant permitted the respondent to exceed the Ksh. 50,000/- credit limit, this was in accordance with the conditions of use of the card and the respondent had on page 20 of the record of appeal admitted that he had been issued with a booklet which contained conditions of usage of the credit card, and that the respondent was aware that if he exceeds the limits, he would be liable to pay so he could not be allowed to say "*you allowed me to go over the limit. I should not pay.*" On the amount outstanding, the appellant's counsel maintained that the same was based on the March 1998 statement which included interest and penalties which was also in the conditions of the credit card issuance to the respondent. He reiterated his prayer that the appeal be allowed with costs to the appellant.

I have carefully analyzed and evaluated the pleadings, evidence, submissions and judgement of the Subordinate Court and the rival submissions in favour for and against the appeal herein.

My first duty as the first Appellate Court is governed by the provisions of Section 78 of the Civil Procedure Act, to evaluate and consider the evidence and the law, and exercise as nearly as may be, the powers and duties of the Court of the original jurisdiction. I am also guided by the decision in **SELLE – VS – ASSOCIATED MOTOR BOAT CO. [1968] EA 123** to evaluate the trial Court's evidence, analyze it and come to my own conclusion, but in doing so, give allowance of the fact that I neither saw nor heard the witnesses.

As an Appellate Court, I will only interfere with the Subordinate Court's judgment if the same is founded on wrong principles of fact and or law as guided by the Court of Appeal's decision in **MKUBE – VS – NYAMORO [1983] KLR 403-413** that:

“a Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

Per **Kneller & Hanno Ag JJA.**

However, this Court is not bound to follow the trial Court's findings of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

I have carefully considered the appeal herein and the record together with rival submissions by parties, the evidence and documents in support of the claim and the opposing testimonies. I have also considered the judgment by the Learned Trial Magistrate. The issues for determination in this appeal, in my view, can be summarized as follows:-

1. Whether the respondent was issued with a Co-op credit card by the appellant and if so, on what conditions of usage
2. Whether the respondent breached any of the conditions and terms of usage of issuance of the Co-op card credit card and if so, what was the extent of the breach
3. Whether the respondent was liable for exceeding the credit limit and for using an expired credit

card.

4. Whether the respondent is liable to pay to the appellant the exceeded amount, interest and late payment charges and if so, how much is the appellant entitled to recover from him.

On issue No. 1, it is not in dispute that the respondent was issued with a Co-op credit card by the appellant, which issuance had condition of usage attached thereto and which the respondent duly signed on 7th September 1995, agreeing to be bound by the conditions (as amended from time to time). He also agreed to be liable for all charges through the use of the credit card.

Condition 3 on statement payment thereof provided that:

(3) Should the card holder's account go in excess, an **over the limit fee will be levied on the amount over the credit limit.** The amount should be cleared immediately to avoid card withdrawal. A **late payment fee was also chargeable at 3%** of the amount shown in the monthly statement in respect of the card account, as having been payable but is unpaid or is deemed to have been unpaid in respect of the previous statement will be charged to the card account by way of agreed liquidated damages for non-payment of that amount in cleared funds within 20 days of the due date.

On issue No. 2, it is clear that the conditions of usage, were, among others, that the card holder – respondent had a credit limit of Sh. 50,000/- but he exceeded the said credit limit and as there was an allowance in the conditions for exceeding the credit limit to the extent that if he exceeded the credit limit, he was liable to pay an over the limit fee on the exceeded amount. Therefore there was no breach of the condition as the agreement permitted exceeding the limit provided the respondent would pay a fee on the exceeded amount as a matter of course as well as the amount in excess and other charges as per the contract of issuance.

On issue No. 3, the answer is found in issue No. 1 and 2 that in the event of exceeding the credit limit, the respondent would be liable to the appellant to pay the exceeded amount as well as the over the limit fee levied. However, on the issue of using an expired card, the contract did not mention the consequences as it was presumed that the respondent would return the card upon its expiry or surrender it to the appellant upon expiry. He was expected to safeguard the card and report any loss thereof to the Co-op card centre. The bank was expected to send to the respondent monthly statements showing total debits or credit balances and demanding for payment.

There is evidence on record that the bank was indeed submitting to the respondent such bank statements showing the transactions, levies and charges where there was excess of limit and or late payments and even after the card had expired with the last statement issued on 16th December 1999 demanding for 178,040.83 to reach the bank by 5th January 2000; and accruing from the previous statement showing the amount due as 191,573.18, credited with Sh. 23,584.54 and added to it Sh. 10,051.19 as late payment fee.

The rest of the statements show late payment levies, bulletin charges and over the limit fees levied on the respondent for using an expired card, besides debits for using the card to procure several goods at various outlets.

The respondent argues that the appellant is responsible for failing to stop the usage of the card after it became apparent that the respondent was exceeding the credit limit and that the card had expired. With utmost respect, this Court finds that the parties having freely entered an agreement, the duty of this Court is to enforce the same not to re-write it. The respondent willingly and voluntarily accepted the terms and conditions of the usage of the card among them, that if he exceeded the credit limit of Sh. 50,000/- he could be liable to pay extra charges. These charges were levied by the bank and they were not denied in the pleadings by the respondent. Neither was it claimed that they were illegal. There is no reason why the respondent could not pay for using the card and exceeding the credit limit and the charges thereof, whether or not the card was blacklisted or expired. The respondent did not allege in his pleadings that the card was lost or that it was being used by another person.

He did not deny that he used the card in the outlets shown on the statements otherwise he would have so pleaded in his statement of defence. Parties are bound by their pleadings and they adduce evidence that tend to prove what they allege. Not to plead different things and adduce evidence to prove other things that are not pleaded. Although the respondent alleges that he cleared all outstanding credits of Sh. 71,000/- due in final settlement and that he surrendered the credit card to the appellant after settlement of the said sums after seeking to know the balance due in February 1998, and albeit the statement of 16th March 1998 shows a credit payment of 71,000/-, the amount brought forward from the previous statement of 16th February 1998 was 97,872.69, and therefore even after payment of 71,000/- this amount could not have cleared the full amount due. In addition, he does not deny that the said payment was in arrears and included excess over the limit and other charges, and that therefore the bank was entitled to charge the limit fees as well as interest and late payment fees, in addition to bulletin charges.

Further, the respondent did not deny using an expired card to procure for goods and services even after he had paid off the Sh. 71,000/- on 3rd March 1998 as shown on the statement at page 24 of the supplementary record of appeal. In addition, albeit he stated in his defence that he returned the card, he did not prove by his testimony when such card was returned and whether he received any acknowledgement for such return. The appellant denies the return or surrender of the card. It was therefore incumbent upon the respondent to prove that indeed he returned the card after the 3rd March 1998 payments; and that he did not use the said card after that date.

The respondent's plea that he returned or surrendered the credit card is unsupported. I believe the evidence on record that he continued using the card even after paying Ksh. 71,000/- on 3rd March 1998. As such, there was no justification for the trial magistrate to enter into calculations that were neither pleaded nor evidence adduced to prove that the balance was Sh. 28,872.69 and not the amount claimed, for reasons that having found that the amount owing as at 3rd March 1998 was 97,872.69, she erred in failing to take into account the subsequent transactions that attracted excess credit limits, levies over the excess limit, interest, late payment charges and bulletin charges as exhibited by the statements produced in evidence from 16th March 1998 upto 16th December 1999 all culminating into Ksh. 178,040.83.

Furthermore, it is my view that the trial magistrate erred in finding that any subsequent claim should have been based on a balance of Sh. 28,872.69 when it was clear that the various levies were distinct from and added to the principal amounts due at any one given time.

Although the respondent stated in cross examination that he protested at the statements, he did not exhibit a single protest letter addressed to the appellant. In addition, if the Court was to believe that the card was surrendered, the respondent had to prove as stipulated in clause 7 of the conditions of use of the card that the agreement could only be terminated by the card holder by a written notice to the bank. No such notice was exhibited. He has introduced the idea of the 1998 bombings of the appellant bank in cross – examination. Assuming the bank lost its records to the bomb blast, it was expected that the respondent on his part would then prove that the contract terminated by producing his copy of a written notification submitted to the appellant.

However, I find that no such records concerning the dispute herein were destroyed as the statements produced were consistent from 16th November 1995 – 16th December 1999.

Although the respondent alleged that he never ever defaulted in repayment and that he did not incur any expenses after March 1998; in addition that he does not acknowledge charged bulletin charges as they refer to a blacklisted used card and that one cannot use a blacklisted card to obtain services or goods. Yet, as I have stated above, he has not proved that he surrendered the card after it was blacklisted by the appellant. His allegation that he never received statements is not supported as it is clear he never changed his postal address. He even contradicted himself in cross examination by admitting that he received statements but protested at the charges. He further admits receiving statements for March 1998 on 16th February 2002 and that he wrote to the bank upon realization that they were wrong but he never produced a protest letter. He further admitted driving to Mumias and fuelling at Mumias Total Petrol Station after the card was blacklisted, but he does not state that he did not use the card in issue. He does not say he

paid by cash either.

From the foregoing, I find that the respondent was liable to pay to the appellant the exceeded amount, interest and late payment as well as bulletin charges that accrued on account of using the Co-op credit card No. 4407 8200 0000 3634 from 16th November 1995 to 16th November 1999. I further find that he is liable for the sum claimed by the appellant, having failed to prove that he surrendered the credit card or terminating the contract and having acceded to the conditions of usage of the credit card.

The respondent's claims that the appellant's failure to stop usage of expired card and their permitting the respondent to exceed the credit limit without warning operated against them has no legal basis. He knew the conditions for usage of the card, and his contention that the interest charged was on wrong balance had no legal or factual basis. I dismiss it.

I therefore interfere with the Trial Magistrate's findings and allow the appeal herein, setting aside the judgment and decree dismissing the appellant's suit with costs and substituting it with an order entering judgment in favour of the appellant as prayed in the plaint for a sum of Sh. 178,040.83 with costs of the suit below and the appeal and interest on the claimed sums at Court rates from date of filing suit until payment in full.

Dated, signed and delivered at Nairobi this 21st Day of October, 2014.

R.E. ABURILI

JUDGE